MONOPOLIZING AT COMMON LAW AND UNDER SECTION TWO OF THE SHERMAN ACT

SECTION two of the Sherman Act, the section dealing with monopolizing and attempts to monopolize, has had an unfortunate history. Although in terms it applies to individual offenses, and to *any part* of the commerce among the States, in practice it is seldom used as the basis of action except in connection with a general charge of combination or conspiracy, or in cases where a relatively large proportion of, or widely ramified commerce among the States is involved. This situation is unfortunate in two respects: In the first place it restrains the Government from proceeding against evils as such where they may be found to exist, and in the second place it furnishes a constant temptation to resolve into conspiracies, subject to punishment or dissolution, combinations or associations which in some respects at least may be performing a distinct service. It is the object of this paper to explain how this situation has arisen and to show that the difficulty results from a too narrow construction of the section rather than as a necessary consequence from its language; and it will be helpful to direct attention at the outset to certain peculiarities in the structure of the act.

Let it be observed that section one deals with every contract, combination, etc., in restraint of trade or commerce among the several States or with foreign nations, and that the precise language of section two is as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section three extends the provisions of section one to the territories and the District of Columbia, but makes no reference to

the provisions of section two. Again, section six subjects to condemnation property which is subject to section one, and in course of transportation, but like section three makes no reference to the provisions of section two or to property held thereunder.

While these apparent discrepancies, resulting from the failure in any part of the act to prohibit monopolization or attempts to monopolize in the territories and the District of Columbia, and the failure to provide for the seizure of property which has been monopolized not only in the territories and the District of Columbia, but also among the states and with foreign nations, have not entirely escaped remark, no definite attempt, so far as the writer is aware, has ever been made to explain them. An interpretation of section two to be acceptable must meet this difficulty, and its soundness may be judged by the degree in which it does so.

Section Two was Designed to Incorporate the Provisions of the Common Law Protecting the Freedom of Trade into the Law of the United States

"The great thing that this bill does," declared Senator Hoar in discussing this provision in the Senate, "except affording a remedy, is to extend the common law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States."

The occasion for this remark appears from the following extract from the record:[1]

"MR. GRAY. Before the Senator from West Virginia arose I had the bill before me and was about to offer an amendment which was directed precisely to the point he has raised, and I shall offer that amendment now. It is to strike out of section 2, in lines 1 and 2, the words 'monopolize, or attempt to monopolize or,' so that the section shall read:

"'Every person who shall combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, ...'

"We will avoid by that amendment the objection which I think the Senator from West Virginia has very pertinently raised. I do not know what definition the courts of the United States have ever given to the word 'monopoly' or 'monopolize.' It is true that, because I

[1] CONG. RECORD, vol. 21, 3152.

do not know it, it does not follow that they may not have defined those terms; but we avoid the danger by this amendment of incorporating in the bill words that are not susceptible of exact legal interpretation, and we confine the provisions of this bill to an inhibition of the combination or conspiracy to monopolize, which we all agree should be the object of its denunciation.

"MR. HOAR. I put in the committee, if I may be permitted to say so (I suppose there is no impropriety in it), the precise question which has been put by the Senator from West Virginia, and I had that precise difficulty in the first place with this bill, but I was answered, and I think all the other members of the committee agreed in the answer, that 'monopoly' is a technical term known to the common law, and that it signifies — I do not mean to say that they stated what the signification was, but I became satisfied that they were right and that the word 'monopoly' is a merely technical term which has a clear and legal signification, and it is this: It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him.

"Of course a monopoly granted by the king was a direct inhibition of all other persons to engage in that business or calling or to acquire that particular article, except the man who had a monopoly granted him by the sovereign power. I suppose, therefore, that the courts of the United States would say in the case put by the Senator from West Virginia that a man who merely by superior skill and intelligence, a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, got the whole business because nobody could do it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business.

"MR. KENNA. If the Senator will permit me, I should like to ask him whether a monopoly such as he defines is prohibited at common law. I ask the Senator from Massachusetts whether a monopoly coming within the definition which he gives is prohibited at common law.

"MR. HOAR. I so understand it.

"MR. KENNA. Then why should this bill proceed to denounce that very monopoly?

"MR. HOAR. Because there is not any common law of the United States.

"MR. KENNA. There is a common law in nearly every State in the Union.

"MR. HOAR. I know. The common law in the States of the Union of course extends over citizens and subjects over which the State itself

has jurisdiction. Now we are dealing with an offense against interstate or international commerce, which the State cannot regulate by penal enactment, and we find the United States without any common law. The great thing that this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States.

"MR. EDMUNDS. I have only to say, in regard to the amendment suggested by my friend from Delaware and the suggestions of the Senator from West Virginia, that this subject was not lightly considered in the committee, and that we studied it with whatever little ability we had, and the best answer I can make to both my friends is to read from Webster's Dictionary the definition of the verb 'to monopolize.'

"'1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea.'

"Like the sugar trust. One man, if he had capital enough, could do it just as well as two.

"'2. To engross or obtain by any means the exclusive right of, especially the right of trading to any place, or with any country or district; as, to monopolize the India or Levant trade.'

"The old definition. So I assure my friends that although we may be mistaken (we do not pretend to know all the law) we were not blind to the very suggestions which have been made, and we thought we had done the right thing in providing, in the very phrase we did, that if one person alone instead of two, by a combination, if one person alone, as we have heard about the wheat market in Chicago, for instance, did it, it was just as offensive and injurious to the public interest as if two had combined to do it."

In a later discussion in the House,[2] Mr. Culberson explained the section as follows:

"It is provided by the bill that any person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. This is a very important and far-reaching provision. I will read to the House what appears to be Webster's definition of a monopoly:

"'To engross, to obtain by any means exclusive right of trade to any place or within any country or district, as to monopolize the trade.'

[2] CONG. RECORD, vol. 21, 4090.

"That is the definition as given by Webster. Every person, therefore, who shall attempt to monopolize, to engross, or to obtain by any means exclusive control of interstate trade to any place, or within any country or district, will be guilty of a misdemeanor under the provisions of the bill. I need only say that there are many cases within our observation in which combinations have succeeded in monopolizing, in part at least, trade between localities in different States. It is to be hoped that if this measure becomes a law an end may be put to such practices and the people relieved of extortion which the destruction of competition always produces."

In the light of the remark of Senator Hoar and the surrounding discussion, as set forth above, it will readily be seen that the discrepancies noted in the structure of the Act are apparent rather than real when it is once perceived that the purpose of the section was not to create new crimes, not to announce new doctrines, but simply to give the old doctrines as wide an application as was possible and consistent with the limited jurisdiction of the United States.

It is well known that as a general rule the common law has been expressly adopted as the rule of decision in the courts of the territories of the United States, except in so far as it is inapplicable or inconsistent with Acts of Congress, or of the territorial legislature.[3] The provisions of one of the fundamental laws of the Territory of Arizona is probably typical of similar laws in the other territories; declaring that

"The common law of England so far as it is consistent with and adapted to the natural and physical condition of this Territory and the necessities thereof, and not repugnant to, or inconsistent with, the Constitution of the United States, or bill of rights, or laws of this Territory, or established customs of the people of this Territory, is hereby adopted and shall be the rule of decision in all the courts of the Territory."[4]

Similar remarks apply to the District of Columbia. The common law and early English statutes, which were adopted by the Constitution of Maryland, are in force in the District of Columbia, except in so far as they have been expressly or impliedly abrogated by Act of Congress.[5]

[3] Pyeatt *v.* Powell, 51 Fed. 551; Browning *v.* Browning, 3 N. M. 659; First National Bank *v.* Kinner, 1 Utah 100.

[4] Act 68, Laws of Territory; Luhrs *v.* Hancock, 181 U. S. 567, 570.

[5] Kendall *v.* United States, 12 Pet. 524, 614.

The territories and the District of Columbia, therefore, were already subject to the common law. Every person who monopolized or attempted to monopolize trade or commerce in those jurisdictions was, in the conception of the framers of the Sherman Act, already subject to punishment under the ancient principles.

The situation with reference to the provisions of section one was different. Congress was under the impression that by that section it was making illegal certain contracts, etc., which theretofore had not been considered illegal under the common law. Consequently, if such contracts, etc., were to be made illegal in the territories, and in the District of Columbia, it was necessary expressly so to provide.

This purpose the act as framed was adapted to achieve. Sections one and two apply to that commerce which is within the scope of the commerce clause of the Constitution, and section three to that commerce over which the Federal Government has jurisdiction by virtue of its sovereignty.

The Freedom of Trade at Common Law was Protected by the Provisions against Engrossing, Forestalling, and Regrating

"Trade and commerce have ever been deemed by legislators, objects of the highest importance, those branches thereof especially, which concern articles necessary for the sustenance of man. Attempts to interrupt or impede commerce of this kind, have in all ages and in all nations, by common consent, been resisted and guarded against." [6]

A brief sketch of the nature and history of the law against engrossing, forestalling and regrating must make it evident that these were the provisions above all others which "protected fair competition in trade in old times in England." Much confusion has surrounded the use of these terms from the failure to perceive that they do not describe separate offenses, but merely different phases of one offence, *i. e.*, violation of the freedom of trade, while engrossing is the term that has survived in modern usage and that was employed by Congress.

Forestalling is the term that has the longest history, having done service for a considerable period to designate what was later described by the three words together.

[6] ILLINGWORTH, AN INQUIRY INTO THE LAWS, ANTIENT AND MODERN, RESPECTING FORESTALLING, REGRATING, AND INGROSSING (London, 1800), 1.

"In ancient time," says Coke, "both an ingrosser and regrator were comprehended under forestaller." [7]

This broad use of the word is well illustrated by the Lombard's case, printed below,[8] "whereby it appeareth, that the attempt by words to inhaunce the price of merchandise was punishable at law and did sound in forestalment," [9] and by the proceedings of the Leet in the ancient town of Norwich in the thirteenth and fourteenth centuries where John Janne is amerced

"because he forbars the men of the city from the purchase of tallow, whereby the market is diminished;" Ranulph, the fish-monger, "because he went outside the town by Carrow to meet a boat full of fish and there he bought it contrary to the proclamation against the heighening[10] of the market of Norwich;" John de Gaywood, taverner, because he "forestalled so many eggs in the market that he filled 28 barrels at divers times and sent them out of the kingdom to foreign parts, and likewise forestalled butter and cheese to a large amount, whereby there accrued great dearness of victuals in the city and that for four years;" and Roger Calf because he was "wont to buy oysters by forestalment in divers boats, so that when one boat is at the Staith for the sale of (oysters) another boat or two shall be at Thorpe until the first boat is emptied and sold, and then the rest of the boats come up for sale; and whereas the common people [11] (were wont) to have 100 oysters for 1½d. Roger sells them for 2d. or 3d. (elsewhere)." [12]

In the earliest statute on the subject, forestalling only is mentioned:

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[7] 3 INST. 195, 196.

[8] LIB. ASSIS. 276, pl. 38 (1368); BEALE, CASES ON CRIMINAL LAW, 3 ed., 1079. A Lombard was indicted in London for concealing the customs of our Lord the King, and for divers other things; and presentment was also made against him, that he had procured and promoted the enhancing of the price of merchandise. And judgment for him was prayed because this was not forestalling, nor could it sound in forestalling; and since it did not appear from the presentment that any wrong was actually done, he should not be held to answer. And *non allocatur;* for KNIVET said, that certain persons (whom he named) came into the neighborhood of Coteswold, and in deceit of the people said that no wool could cross the sea in the next year, there were so many wars in those parts; by which they depressed the price of wool. And they were brought before the King's Council, and could not deny it; wherefore they were put to fine and ransom before the King. And so in this case. Wherefore he pleaded not guilty, &c.

[9] COKE, 3 INST. 196.

[10] A local word, pronounced "haining," and meaning "raising the price."

[11] The original word is *communitas*, better translated, "the public."

[12] LEET JURISDICTION IN NORWICH (Selden Society), 30, 47, 63, 65.

"But especially be it commanded on Behalf of our Lord the King, that no Forestaller be suffered to dwell in any Town, which is an open Oppressor of poor People, and of all the Commonalty and an Enemy of the whole Shire and Country, which for Greediness of his private Gain doth prevent others in buying Grain, Fish, Herring, or other Things to be sold coming by Land or Water, oppressing the Poor, and deceiving the Rich, which carrieth away such things, intending to sell them more dear; (2) the which come to Merchants Strangers that bring Merchandise, offering them to buy, and informing them that their goods might be dearer sold than they intended to sell, and an whole Town or a Country is deceived by such Craft and Subtelty; (3) He that is convict thereof, the first Time shall be amerced, and shall lose the Thing so bought, and that according to the Custom and Ordinance of the Town; (4) he that is convict the second Time shall have Judgement of the Pillory; (5) at the third Time he shall be imprisoned and make Fine; (6) the fourth Time he shall abjure the town. And this Judgement shall be given upon all Manner of Forestallers, and likewise upon them that have given them Counsel, Help or Favour." [13]

The ancient ordinances and by-laws of London, as recorded in the *Liber Albus*, many of which ante-date *Magna Carta*, contain numerous provisions in condemnation of forestalling, but engrossing, as such, is not mentioned.

The modern learning concerning regrating, forestalling and engrossing dates from a much later period — the enactment of 5 and 6 Edw. VI, c. 14 (1552), repealed in 1772 by 12 Geo. III, c. 71. The statute bears internal evidence of a growing confusion as to the nature of the crime of forestalling, a confusion probably due to the changing economic structure following the discovery of America, and the absence of an enlighted analysis and statement of legal principles. It begins with a recital that:

"Albeit divers good statutes heretofore have been made against forestallers of merchandises and victuals yet for that good laws and statutes against regrators and ingrossers of the same things, have not been heretofore sufficiently made and provided, and also for that it hath not been perfectly known what person should be taken for a forestaller, regrator, or ingrosser, the said statutes have not taken good effect, according to the minds of the makers thereof; Therefore be it enacted, etc. . . ."

[13] As printed in 1 STAT. AT LARGE (Ruffhead ed.), 188, chap. 10. Referred to period HEN. III (1216)–EDW. II (1307), but probably a mere codification of long practice.

The statute then continued at great length in an attempt to define the particular circumstances under which forestalling, regrating, and engrossing should constitute offenses. The frame of the act was unscientific, and there were provisions and exceptions without number. The wonder is not that the law was eventually repealed, but that it remained on the statute books and was enforced for more than two hundred years.

Very few writers have gone back of this statute in their study of engrossing, forestalling, and regrating, and because of the repealing Act it is assumed by many that these terms have no significance or application under modern conditions. They are assumed to refer to buying at wholesale and selling at retail, or to the commonplace operations of middlemen. The following summary probably represents the view which is currently accepted:

"The Three Offences. — The three offences of regrating, forestalling and engrossing attempt to cover broadly:

"1. The purchase by middlemen of certain necessaries of life on their way to market.

"2. The purchase by middlemen of certain necessaries of life which have already arrived in market, and the selling of the same again in the same market or within four miles thereof.

"3. The buying or contracting for by middlemen of certain necessaries of life while in the hands of the producers with the intent to sell the same again.

"In short, the statute makes it a criminal offence for any person to either buy or contract for certain necessaries of life while the same are in the hands of the producers with the intent to sell the same again, or while said necessaries of life are on the way to market, or after they have reached the market." [14]

Blackstone's statement as to the nature of the offenses is of particular interest because of its influence upon American legislation and legal thought, and the fact that it was written about the time that the old statutes were repealed:

"The offence of *forestalling* the market is also an offence against public peace. This, which (as well as the two following) is also an offence at common law (2 Hawk. P. C. 235) is described by statute 5 and 6 Edw. VI, c. 14, to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from

[14] EDDY, COMBINATIONS, vol. 1, 48.

bringing their goods or provisions there; or persuading them to enhance the price, when there; any of which practices make the market dearer to the fair trader.

"Regrating is described by the same statute to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.

"Engrossing was also described to be the getting into one's possession, or buying up large quantities of corn, or other dead victuals, with intent to sell them again. This must of course be injurious to the public, by putting it into the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any other commodity, with intent to sell it at an unreasonable price, is an offence indictable and finable at the common law." (Cro. Car. 232.) And the general penalty for these three offences by the common law (for all the statutes concerning them were repealed by 12 Geo. III c. 71) is, as in other minute misdemeanors, discretionary fine and imprisonment. (1 Hawk. P. C. 234.) Among the Romans these offences and other malpractices to raise the price of provisions, were punished by a pecuniary mulct. '*Poena viginti aureorum statuitur adversus eum, qui contracannonam fecerit, societatemve coierit quo annona carior fiat.*'" [15]

Based upon the data before them, the editors of the records of Norwich, cited above, define the offenses and the less well-known term, "forbarring," as follows:

"Forbarring was stopping goods from entering or from being exposed in, the market, with a view to selling them outside the city, thus diminishing the supply. Forestalling was intercepting goods outside the city in order to sell them at a higher price in the market, thus raising the market price. Regrating was buying in the market to re-sell in smaller quantities. This was permitted under certain conditions." [16]

Useful for the purposes of comparison is the statement of Gras:

"One of the commonest of early offences on the part of those dealing in corn was engrossing. This term has often been defined, but its meaning was never clear because it had no single technical application. It referred to monopolizing the supply of a commodity in any way, whether by forestalling or by regrating. It also had a particular meaning, given it by statute, to get into one's hands, 'any Corne growinge in the feildes.' This seems to have been the nearest approach to a technical definition.

[15] COMMENTARIES, Book 2, chap. 12.

[16] *Supra*, note 12.

Finally, to engross was to deal in many kinds of commodities instead of only one.

"To forestall was to go out beyond the borough or market town to buy goods coming to market. This was prohibited in the Anglo-Saxon period, and, indeed, seems to have been the earliest form of market monopolizing, or engrossing in the general sense, that was put under the ban of the law. The corn trade, however, is not specified in this early law which was perfectly general in application. But in thirteenth century laws the forestalling of corn is specifically mentioned. The objection to forestalling was that it undermined the public and open market and tended to raise prices, and also that it resulted in a loss of local revenue when the forestaller was a burgess and the seller of the goods a stranger, for while the latter was subject to town tolls, the former was not.

"Akin to forestalling, and at times confused with it, was regrating. This was the purchase of goods for sale in the same or a nearby market. It was prohibited locally from at least the thirteenth century onward.

"For centuries such attempts to monopolize the local market were met by local regulations and national legislation, which continued down to modern times." [17]

The foregoing attempts at definition show the difficulty of drawing any hard and fast line between the three terms, and the reason is self-evident. The words are in reality different terms for the same offense looked at from different angles. The essence of the offence consisted in the deliberate manipulation of prices and markets by practices outside the due course of trade, and whether engrossing, forestalling, and regrating constituted an offence could only be determined from a consideration of all the surrounding circumstances.

Forestalling could be accomplished by engrossing and regrating, regrating by forestalling and engrossing, and engrossing by forestalling and regrating. The words, or at least two of them, were used together more frequently than otherwise in describing an offence.[18] Engrossing directed attention to the quantity, forestalling to the diversion or interruption of goods in the course of transit to the market, and regrating to buying to sell again in the

[17] EVOLUTION OF THE ENGLISH CORN MARKET (Harv. Univ. Press, 1915), 130.

[18] SELECT PLEAS IN THE STAR CHAMBER (Selden Society), vol. 2, 218, note: "'Ingrossing and regrating' which are always coupled together, appear to describe two steps of what was substantially the same transaction. The ingrosser bought goods wholesale with a view to regrating, that is, selling them again wholesale, 'Regrator denotes him that buys or sells anywhere the victuals in the same market or fair.'"

same market — conduct which was unprofessional and unfair when the purpose of the market was taken into account.

Blackstone is evidently right in emphasizing the common feature of enhancement of prices, Gras in laying stress upon monopolizing, and Stephens in describing the three things as one offense. As the latter says:

"Forestalling, ingrossing and regrating was the offence of buying up large quantities of any article of commerce for the purpose of raising the price. The forestaller intercepted goods on their way to market and bought them up, so as to be able to command what price he chose when he got to the market. The ingrosser or regrator — for the two words had much the same meaning — was a person who, having bought goods wholesale, sold them again wholesale. This was regarded as a crime." [19]

Engrossing, Forestalling and Regrating Constitute Offenses under the Common Law at the Present Time

The statute of 5 and 6 Edw. VI, says Wharton:

"was brought with them by the English colonists who settled in North America, and though in its details, *e. g.*, in prohibiting purchase by middlemen in the cheapest market and selling in the dearest, it is in conflict with the sound and healthy system of political economy, it is in one point a recognition of common law principle which it is important here specifically to enunciate.

"While one must regard the provisions of the Roman and English statutes against middlemen and commission merchants as obsolete; and while in England the statute of 5 and 6 Edw. VI has been repealed by 12 Geo. III, c. 71, yet, entirely apart from these statutes, we must hold it to be indictable, on general principles of common law, to engross and absorb any particular necessary staple or constituent of life so as to impoverish and distress the mass of the community for the purpose of extorting, by terror or other coercive means, prices greatly above the real value. Questions of this kind have usually come before the courts on indictments for conspiracy; for it is by conspiracies that extortions of this kind are generally wrought. But on an indictment against an individual for buying up all the grain or other necessary staple so as to produce a famine in the market, and thus to obtain grossly extortionate prices, wrung through a sense of misery from the community, the offence may be held indictable at common law. For not merely is the extortion

[19] HISTORY OF THE CRIMINAL LAW OF ENGLAND, chap. 10, 199.

to be taken into account, but the terror as to the future, and the misery at the present, which are thus inflicted on a community at large. But to sustain such a prosecution, the commodity must be a necessity, it must be absorbed by the monopolizer, and the prices must be unjustly extortionate." [20]

Even in England where the repealing statute of 12 Geo. III was operative, the courts continued to punish engrossing, forestalling, and regrating under the common law until the passage of 7 and 8 Vict., c. 24 (1844), whereby prosecutions under the common law were expressly prohibited, but as recently as the Adelaide Steamship Company, Ltd., case [21] the court took occasion to observe that even the Victorian statute did not apply to the Colonies.

The decisions of a number of American state courts, including Rhode Island and Texas, expressly recognize engrossing and regrating as existing offenses, and the Mississippi Antitrust Act refers to combinations, etc. "To engross or forestall a commodity," while forestalling, engrossing, and regrating are in terms still prohibited by the Georgia Code.

Congress used Language Adapted to Describe the Common-Law Offenses, and Section Two ought to be Construed to Include Them

The word "monopoly" does not occur in the text of the Sherman Act, and as Chief Justice White noted in the Standard Oil case,[22] it is not "monopoly" but "monopolizing" that is prohibited. There is not now and never was a common-law offense known as "monopoly" apart from all considerations of subject-matter and means employed. The statute of 21 James I, which is often erroneously assumed to have prohibited monopolies was of a political nature and was aimed at abuses of the royal prerogative. The Act itself expressly provides that it shall not be prejudicial to any grant of privilege, power or authority whatsoever theretofore made or confirmed by an act of Parliament, nor was it to be prejudicial to the grants, charters or customs of the City of London or any town: "or unto any corporations, companies or fellowships of any art, trade, occupation or mystery, or to any companies or

[20] CRIMINAL LAW, 11 ed., §§ 2210, 2211.
[21] 1913, A. C. 781.
[22] United States *v.* Standard Oil Co. of N. J., 221 U. S. 1, 62.

societies of merchants within this realm, erected for the maintenance, enlargement or ordering of any trade or merchandize," nor to the fellowship and guild of Newcastle "for or concerning the selling, carrying, lading, disposing, shipping, vending or trading of or for any sea-coals, stone-coals, or pit-coals, etc. . . ."

Had Congress intended to deal with monopoly in the concrete, the failure to extend the provisions of section two to section six, as above noted, would be wholly inexplicable. On the other hand, if it be assumed that Congress intended to deal with the common-law offenses, the reason for the apparent omission in section six becomes evident. In this view a person to be guilty under section two need not acquire property.

It is the practice or practices of monopolizing that are condemned, and those practices might or might not result in the acquisition of property which could safely be condemned and seized. For example, in the course of monopolizing, a person may acquire property at a fair price and in the regular course of trade, but with the illegal intent to protect the price of property already in the market which he has previously acquired in a legal manner, and likewise for a fair price.

Had Congress wished to extend section six to the property of persons within the scope of section two, it would have had great difficulty in determining or specifying which parcel of property should in a given case be condemned and seized. On the other hand, if section two were construed to mean acquiring a monopoly or attempting to acquire a monopoly, this difficulty would not exist, and the failure to extend the provisions of section two to section six could only be regarded as a mistake and an oversight in draftsmanship.

The word "monopolize" was a suitable term for describing the common-law offenses. The term "engrossing" alone was not satisfactory, for, as has been noted, the circumstances had to be taken into account in determining whether mere forestalling, engrossing and regrating should be held to violate the common law. "Monopolize," on the other hand, indicated the evil as such, not the mere possession of a monopoly, but the commission of those acts of extortion and oppression which brought the monopolists of Elizabeth into disrepute, by the enhancement of prices and the interference with the freedom and due course of trade.

As shown below,[23] this use of the words, "monopolizer," and "monopolizing," as synonymous with the manipulation of prices

[23] MURRAY'S ENGLISH DICTIONARY in its definition of "Monopolizer" gives the following illustration of usage in the year 1651: "Monopolizers, who were called engrossers, forestallers and regrators, and many others who were punishable by imprisonment and the pillory."

In the Appendix to ILLINGWORTH'S STUDY ON FORESTALLING, etc., *supra*, note 6, are to be found numerous petitions addressed to the House of Commons in the second half of the eighteenth century, wherein engrossers, forestallers and regrators are referred to as monopolizers.

In the town of Boston during the Revolutionary period there is the like usage, and we find the phrases, "monopolizing and forestalling," "monopolizers and forestallers," "forestallers, engrossers and monopolizers," etc. The Massachusetts statute referred to by Chief Justice White in the Standard Oil case, wherein as he points out monopoly and forestalling are spoken of as the same thing, is described in these records as the "Monopolizing Act." The report of the committee appointed by the Town of Boston in 1779 to investigate is of peculiar interest in this connection because of its definite statement of fact.

"The Committee of seven appointed, to Enquire into the Conduct of Forestallers Engrossers and Monopolizers, and to ascertain Facts — Reported in part

"That on or about the fourteenth of January last, Matthew Fairservice purchased a quantity of Rum and Sugar at Salem and Marblehead that he gave forty Pounds for the Sugar p. Hundred, and thirteen Dollars p. Gallon for the Rum

"That about the same time John Fairservice purchased a large quantity of Sugar, for which he says he gave £45.- and £47. 10/p hundred, and sold them for £58.-p hundred which gave him an extravagant Profit of £10:10/ and £13.-p hundred; which obliges the Poor Consumer to pay a still Greater price to the Retailer, by means of which engrossing your Committee look upon the Town greatly injured

"That one Sampson Reed a Stranger is suspected of Engrossing and Forestalling the Necessaries of Life — that in a particular Manner he has monopolized a great quantity of Glass, for a Considerable quantity of which he did not give £30.-p Box and sold it for £100-p Box — that he has had twenty four Boxes of Window Glass in halves, some of which he has sold for ten Shillings a Square, to the great determent of the Community

"'That your Committee are seeking proof against Sundry others and shall be ready to Report at an Adjournment or some future Meeting.'" Boston Town Records (1779), 44.

Malynes in his LEX MERCATORIA, published in 1622, draws attention to the relation between "displeasing" monopolies and engrossing, forestalling, and regrating. He says:

"Monopolies are somewhat displeasing, because the property of them is commonly to ingross things to an ill end, increasing the price thereof disorderly, drawing a general benefit to a particular, diverting the course of Traffick. . . .

"The Civilians have made the *Latine* word *Monopolium* borrowed from the Greek, to be less understood, because of their many definitions thereof; which made me to treat of Associations, Monopolies, Ingrossings, and Forestalling, as having affinity one with another, and to describe them in divided manner, as also to note their coherence, as followeth. For an Association, Company, or Society may become a Monopoly in effect; when some few Merchants have the whole managing of a Trade,

by practices outside the due course of trade, and with the old offenses of engrossing, forestalling, and regrating was wide-spread in the seventeenth and eighteenth centuries and represents, it is submitted, the sense in which "monopolize" is employed in the Sherman Act.

In *King* v. *Waddington*,[24] which was an indictment under the common law, Lord Kenyon, in sustaining a conviction makes no distinction between engrossing, monopolizing, and the raising of prices, as the following extract indicates:

"Again, it is urged that the quantity purchased cannot constitute the offence of engrossing, unless it bear such a proportion to the consumption of the whole kingdom as will affect the general price. This objection is new to me; but if the opinions of Lord Mansfield, Mr. Justice Dennison, and Mr. Justice Foster are deserving of attention, there is as little in that objection as in the rest. I well remember an information moved for before them against certain persons for conspiring to monopolize or raise the price of all the salt at Droitwich. They had no doubt of its constituting an offence, although it was not pretended that these persons had endeavoured to engross all or any considerable part of the salt in the Kingdom. Nor was it questioned but that the monopolizing of salt was an offence at common law. If, then, hops are become a necessary ingredient, though only for preserving the common drink of the people, they must be deemed a necessary of life and a victual, the

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to the hurt of a Commonwealth, when other merchants are excluded to negotiate with their stocks to vent the Commodities of the realm with reputation, according to the word Μόνος *Solus, and* Πολτο *Vendo*, to sell alone. And as this is done many times by one Merchant, for one kind of Commodity, be it Corn, Salt, Oil, Wools, and the like; so may it be done by a Society of Merchants continually, under the colour of Authority. Albeit that there be no combination to limit any certain prices for the sale of Commodities in the particular of one Merchant or more Merchants agreed together to buy up a Commodity, it may be called a Forestalling. As one *Dardanus* did, whereof (as we have said) the name Dardanarli was used by the said Civilians, who define them to be *Qui omnia praemeunt, ut carius vendant*, That Forestall or buy up things, to the end that they should sell them dearer. . . .

"The truest definition of a Monopoly therefore is, A kind of Commerce in Buying, Selling, Changing, or Bartering, Usurped by a few, and sometimes but by one person, and Forestalled from all others, to his or their private gain, and to the hurt and detriment of other men; whereby of course, or by Authority, the Liberty of Trade, is restrained from others, whereby the Monopolist is inabled to set a Price of Commodities at his pleasure."

MALYNES' LEX MERCATORIA seems to have been a common possession of business lawyers in the time of Marshall. BEVERIDGE, LIFE OF MARSHALL. Vol. 1, p. 185, note 2.

[24] 1 East, 143 (1800).

engrossing of which, or committing any undue practices to enhance the price to the public, is an offence at common law."

If, as the Chief Justice says in the Standard Oil case,[25] the words "to monopolize," and "monopolize" as used in section two reach every act, bringing about the prohibited results, and the principal wrong which it was deemed would result from monopoly was the enhancement of prices, then it must follow that this section includes engrossing, forestalling, and regrating at common law, since it was this evil that led to the enactment of the old statutes, and that lay at the root of the common-law offense of engrossing.

"The chief evil thought to be entailed by a monopoly, whether in its strict or popular sense," says the court in *Attorney General of the Commonwealth of Australia* v. *The Adelaide Steamship Co.*, "was the rise in prices which such monopoly might entail. The idea that the public are injuriously affected by high prices has played no inconsiderable part in our legal history. It led, no doubt, to the enactment of most, if not all, of the penal statutes repealed by 12 Geo. III, c. 71. It also lay at the root of the common law offence of engrossing, which according to Hawkins' Pleas of the Crown, vol. 11, bk. 1, chap. 79, consisted in buying up large quantities of wares with intent to resell at unreasonable prices. It influenced the Courts in their attitude towards contracts in restraint of trade. Although, therefore, the whole subject may some day have to be reconsidered, there is at present ground for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce that state of things which is referred to by Lindley and Bowen, L.JJ. as a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent." [26]

Finally, the concluding remarks of the Chief Justice in the Standard Oil case in his discussion of monopoly leave little doubt that section two ought to be construed to embrace the common-law offenses. He says: [25]

"But as it was considered, at least so far as the necessaries of life were concerned, that individuals by the abuse of their right to contract might be able to usurp the power arbitrarily to enhance prices, one of the wrongs arising from monopoly, it came to be that laws were passed relating to offences such as forestalling, regrating and engrossing by which

[25] 221 U. S. 1, 61.

[26] 1913, A. C. 781.

prohibitions were placed upon the power of individuals to deal under such circumstances and conditions, as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices. . . .

"As by the statutes providing against engrossing the quantity engrossed was not required to be the whole or approximate part of the whole of an article, it is clear that there was a wide difference between monopoly and engrossing, etc. But as the principal wrong which it was deemed would result from monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize." [27]

Present Day Application of Section Two in the Light of the Common Law

Since section two applies to individuals and to "any part" of the trade or commerce among the States, and the words "any part" have been held to have both a geographical and a distributive sense, adoption of the views herein advanced would make it possible to greatly extend the usefulness of the Sherman Act, and to apply it to many if not most of the evils as such, quite apart from the question which has so largely engrossed the attention of the courts, namely, whether the wrongs complained of could in some manner be associated with a combination or conspiracy. Especially would this be true if supplemented by closer attention to the relation between business and commerce under modern conditions and to the scope of the commerce clause.[28]

The establishment of conditions under which the forces of supply and demand may freely operate must be one of the chief reasons for the existence of the Sherman Act, and it would be strange indeed if, after these conditions were produced, their

[27] 221 U. S. 1, 52, 53.

[28] See the writer's NOTES ON THE FEDERAL POWER TO REGULATE COMMODITY PRICES UNDER THE COMMERCE CLAUSE, 55 CONG. RECORD, 4008 (June 16, 1917).

continued existence were not guaranteed by any of the prohibitions of the statute. The case would be analogous to the contradictory state of the law illustrated by the failure of the courts to recognize and enforce the common-law duty of service as against ordinary businesses until a condition has grown up requiring prosecution under the Sherman Act, in contrast with the uniform reliance placed upon refusal to serve to sustain such prosecution and upon the enforcement of service as a fundamental form of relief. In both cases the simple enforcement of the common law from day to day would in most cases remedy the evils at their inception and the "problem of the Trusts" could never arise or having arisen would be no longer formidable.[29]

The public injury resulting from regrating, forestalling and engrossing is as great today as at any time of history, and it is a great mistake to suppose because the marketing and distributing system has become more complex, and because under modern conditions certain persons now render a real service to the community who in former times rendered none, that therefore every sort of trade practice is to be tolerated, regardless of whether it is or is not in the due course of trade, and of service or detriment to the community, as the case may be. For many centuries and not improbably for several thousand years, the Ta Tsing Leu Lee [30] or Penal Code of China—a code which has been described as the most comprehensive, uniform, and suited to the genius of the people for whom it is designed, perhaps of any that ever existed—has dealt with these problems in the manner indicated by the following excerpts:

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[29] See the writer's "Business Jurisprudence," 38 HARV. L. REV. 135, and "Labor, Capital and Business at Common Law," 39 HARV. L. REV. 241.

[30] Translated, though not completely, by Staunton London (1810), and as to the chapter relating to Markets by A. Lind, Jr. (Leiden, 1887). As its name indicates the Ta Tsing Leu Lee was the code of the Manchu dynasty (whose accession took place in 1644). According to Lind this code was for the greatest part taken from the code of the preceding dynasty, that of the Ming, who, in their turn borrowed it from their predecessors, and so on through many dynasties till we reach the Tsin dynasty (third century before Christ), when the first regular code of penal laws is reported to have been compiled. More ancient codes are still mentioned in the books of history, like in that of the Han, translated partly by Andreozzi, from which we learn that already the Hia-dynasty (B. C. 2205) had promulgated a penal code.

The Annamese of French Indo-China adopted the Chinese code almost verbatim and have added numerous commentaries. This has been translated into French by Philastre in a monumental work of two volumes (new ed., Paris, 1876).

"*Monopolizers and Unfair Traders.*[31] When the parties to the purchase and sale of goods do not amicably agree respecting the terms, if one of them, monopolizing, or otherwise using undue influence in the market, obliges the other to allow him an exorbitant profit; or if artful speculators in trade, by entering into a private understanding with the commercial agent, and by employing other unwarrantable contrivances, raise the price of their own goods, although of low value, and depress the prices of those of others, although of high value,[32] in all such cases the offending parties shall be severally punished with 80 blows each for their misconduct.

"When a trader, observing the nature of the commercial business carrying on by his neighbour, contrives to suit or manage the disposal or appreciation of his own goods in such a manner, as to derange and excite distrust against, the proceedings of the other, and thereby draws unfairly a greater proportion of profit to himself than usual, he shall be punished with 40 blows.

"The exorbitant profit derived from any one of the foregoing unlawful practices, shall, as far as it exceeds a fair proportion, be esteemed a theft, and the offender punished accordingly, whenever the amount renders the punishment provided by the law against theft more severe than that hereby established and provided. The offender shall not however be branded as in other cases of theft."

"*Extortion of Loans and Unfair Sales.* When any superintending officers of government, or any other persons in official situations, avail themselves of the influence of their authority, or any private individuals, of their personal strength and resources and by means thereof extort loans of the goods or money of the inhabitants of their districts, they shall be punished proportionately to the estimated value of the goods or money borrowed, according to the law against bribery to do an act which is in itself lawful; but when actual force and violence is used, the offenders shall be punished proportionately to the amount according to the law against bribery for unlawful purposes. In each case, the punishment of persons without salaries shall be less by one degree. The articles borrowed shall be restored without reserve or delay to the owners.

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[31] The literal meaning of this title, translated by Lind as "Monopolizing" of the Market, is according to that author, "To put a constraint upon" the Market. Philastre translates it, "Des Manoeuvres ou Pressions dans des Actes de Commerce."

[32] Compare section 198 of the constitution of Kentucky requiring the legislature to enact laws to prevent trusts, etc., from combining "to depreciate" below its "real value," any article, or "to enhance" the cost of any article above its "real value." Dealing with this provision and statutes passed thereunder in International Harvester Co. *v.* Kentucky, 234 U. S. 216, 223 (1914) and Collins *v.* Kentucky, 234 U. S. 634, 638 (1914), the Supreme Court declared that the "elements necessary to determine

"When persons in authority as aforesaid lend their own money or goods to the inhabitants of their districts upon exorbitant interest, or buy or sell goods upon an unfair valuation, the unlawful advantage accruing from such transactions, whether by excessive interest, or buying at a lower rate, and selling at an higher rate, than the market allows,[33] shall be estimated, and the offender punished as in the cases of bribery for a lawful object; but if the influence exerted amounted to compulsion, the punishment shall be rated as in cases of bribery for unlawful objects.[34]

"The articles lent or sold by the offenders shall be forfeited to government, and the articles borrowed or bought by them shall be restored to the owners."

". . . No shopkeeper is allowed to have in store more than 160 picols of rice, wheat or any other species of grain. He who keeps more than that quantity, with a view to raise prices, shall be tried according to the law against 'Infringing the edicts.'

"When a person sells and exports grain, but does not keep it in store with a view to raise prices, the number of picols is not to be taken into account, but he will be at liberty to suit himself, heedless of the 160 picols stipulated in this clause. Whoever buys inferior rice or black-beans from whatever store, is not subject to this clause."

Correct appreciation of the problems associated with business in occidental civilization has been slow, but the time for their solution

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the imaginary ideal (real value) are uncertain both in nature and degree of effect to the acutest commercial mind," and that the term "real value" expressed "no standard of conduct that it was possible to know."

[33] *Cf.* note 32, *supra.*

[34] Dealing with the corresponding section in the Code of Annam on the question whether private individuals fall within its terms, the official commentary to that section as translated by Philastre explains that:

"Ce paragraphe et les quatre paragraphes suivants parlent tous des personnes du peuple, placées dans le ressort de l'autorité, ou de ce qui a lieu dans le ressort où s'exerce l'autorité des coupables, cela désigne donc réellement les fonctionnaires et employés chargés du service de surveillance ou de direction, et les personnes influentes et puissants sont encore comprises parmi eux, parce que ces paragraphes sont la continuation du premier paragraphe qui les mentionne avec les fonctionnaires et les employés. Si tous prennent leur propres denrées ou marchandises et les écoulent en les vendant au peuple dans le ressort de leur autorité ou de leur influence, faisant valoir comme précieux et rare se qui est vil et commun et en exigeant un prix trop élevé; ou bien s'ils avilissent les prix pour acheter des objets, ne donnant pour ce qui est précieux que la valeur de ce qui est commun et s'attribuant un benefice trop considerable, par ces deux sortes de moyens, ils prélèvent un bénéfice trop élevé sur les prix; on retranche le prix convenable des merchandises ecoulées ou achetées et l'augmentation de prix, ou la quotité du défecit que n'a pas été payé, est appelé excedent de bénéfice. . . ."

is at hand, and because of its traditions, its opportunities for observation and study, and the vast legal machinery ready to answer to its will, a grave responsibility rests upon the American bar if, as we must believe, these problems are to be solved by law. In accepting this responsibility we cannot afford to disregard those time tried principles that protected "fair competition in old times in England," the need for the reassertion of which became so evident at the time of the passage of the Sherman Act. Once the analogies are perceived the old principles imbedded in the common law will be found to be as applicable to the conditions of the present as they were to those that have passed.

When one views the subject in this way any doubt as to the soundness of the views of the court in the case of *King* v. *Waddington*,[35] seems impossible.

"Here is a person going into the market," said Lord Kenyon, C. J., "who deals in a certain commodity. If he went there for the purpose of making his purchases in the fair course of dealing with a view of afterwards dispersing the commodity which he collected in proportion to the wants and convenience of the public, whatever profit accrues to him from the transaction, no blame is imputable to him. On the contrary, if the whole of his conduct shows plainly that he did not make his purchases in the market with this view, but that his traffic there was carried on with a view to enhance the price of the commodity; to deprive the people of their ordinary subsistence, or else to compel them to purchase it at an exorbitant price; who can deny that this is an offence of the greatest magnitude? . . . Now this defendant went into the market for the very purpose of tempting the dealers in hops to raise the price of the article, offering them higher terms than they themselves proposed and were contented to take, and urging them to withhold their hops from the market in order to compel the public to pay a higher price . . . I am perfectly satisfied that the common law remains in force with respect to offences of this nature. . . ."

"The freedom of trade, like the liberty of the press," declared Grose, J., in passing sentence, "is one thing; the abuse of that freedom, like the licentiousness of the press, is another. God forbid that this court should do anything that should interfere with the legal freedom of trade. In support of it the law was declared, and that law has repeatedly been acted upon, that to violate the freedom of trade by intercepting commodities in their way to market, taking them from the owner by

[35] 1 East, 157.

force, or, which is the same thing, obliging him to accept a less price than he demands, and carrying them away against his will, or committing the like violation upon him in the market, is a capital offence, for which men have forfeited their lives to the law; for the law so far protects the freedom of trade as to encourage men to bring their goods to market, by punishing those who by acts of violence deter others from so doing. But the same law that protects the proprietors of merchandise takes an interest also in the concerns of the public, by protecting the poor man against the avarice of the rich; and from all time it has been an offence against the public to commit practices to enhance the price of merchandise coming to market, particularly the necessaries of life, for the purpose of enriching an individual. The freedom of trade has its legal limits. . . ."

Replying to certain contentions of the defendant he answered:

"That the offence of which the defendant has been convicted is a direct violation of the rules of just and honourable trade, which encourages every one to bring his goods to market and dispose of them to the best bidder. That the defendant has been guilty of using the undue means stated in the information for the purpose of obtaining an excessive and exorbitant price, higher than any that was demanded at the market, which he attended, for the commodity in which he dealt; by which means a temporary fictitious scarcity was likely to be produced, and the price of the commodity unnecessarily and unreasonably raised upon the public.

"And in truth it must have occurred to any person considering the effect of the statute, 12 Geo. III, how improbable if not impossible it was that the legislature of a great and populous kingdom, ever anxious to provide for the most necessitous objects in it, should have intended by this statute to have taken from the lower and middling classes of men that security against the unnecessary high price of provisions, which the common law intended to give them; and not only to open a door, but throw out a temptation to rich men to speculate upon the price of the necessaries of life at the risk and expense of the poor."

That conditions have changed need not be disputed, but it should not be forgotten that that fact has a two-fold application. Upon the one hand it makes permissible certain practices, which in earlier times would have been detrimental to the public interest. On the other hand it renders detrimental to the public interest other practices which in earlier times would have been wholly unrelated to the public interest. For example, the need of storage,

transportation, and complex marketing facilities under modern conditions cannot be denied. Yet it must be recognized that the trader under modern conditions may have great advantages over the people with whom and for whom he trades, in the way of access to information and contact with marketing machinery — not because of his superior intelligence and greater exertion, but largely because of the function which it has fallen to his lot to perform. He occupies, in a sense, the position of a trustee, and may well be held to be under a greater and higher duty than if his activities bore a different relation to the public interest.

The argument of Solicitor General Lehmann in his brief in the Patten case [36] is of interest in this connection and gains added force when we understand that the common law has not been repealed, and that section two of the Sherman Act was designed to give expression to a fundamental principle of business jurisprudence, and one long familiar to our inherited legal system.

"These statutes were repealed," he argued, "and the common law upon the subject abrogated, not because what was then apprehended as evil was now approved as good, but because it had come to be seen that the evil apprehended did not result from the acts condemned. The middleman whose intervention as to certain commodities had been prohibited as entirely mischievous, it was found, had a useful function to perform which facilitated rather than restrained trade. With improved means of communication and transportation this was undoubtedly true. The middleman secured his place in commerce as a result of the specialization of functions which marked the development of modern industry and trade.

"The thing apprehended as an evil by the ancient statutes and the common law — that is, the arbitrary enhancement of prices — has never ceased to be regarded as an evil and as a restraint of trade. A commodity price abnormally high, too high in its relation to the value of human effort, is in itself a restraint of trade. As the price goes upward fewer people can afford to buy, and trade in the commodity languishes. The law contemplates a free course of trade as the means of securing prices which shall bear a proper relation to each other and of conducing to a prosperous business in every branch of commerce. Give sanction and efficiency to corners in cotton, and in more than one household an old dress will be patched where otherwise a new one would be bought. . . .

"The corner of a commodity does what it was feared forestalling, re-

[36] United States *v.* Patten, 226 U. S. 525.

grating, and engrossing would do. Indeed it employs forestalling, regrating, and engrossing and carries them to the extent of monopolizing the commodity. It is therefore a restraint of trade and not mere gambling and so the authorities hold."

Edward A. Adler.

BOSTON, MASS.